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A FATAL INSTABILITY IN ANARCHO-CAPITALISM?

1. Justice is Full Restitution

Justice obtains when an offender makes amends for his offence, when a criminal pays for his crime, when a victim receives full restitution. This is the basis of common law.

When you are trespassed against, justice demands that you be recompensed for all the loss and suffering wrongfully inflicted upon you. Justice demands that you be returned to the indifference curve you would have occupied had the offence not taken place. Thus, when you have received full justice, you will be marginally glad, not sorry, that the trespass occurred.

When you trespass against another, justice demands that you be punished for the loss and suffering you have wrongfully inflicted. Justice demands that you return your victim to his previous indifference curve. Justice demands that the expectation value of your payment should equal the restitution due to your victim *plus* the full cost of delivering that restitution.

Thus, in justice, the criminal must pay the costs of the court, the costs of policing, and the costs of witnesses and counsel, as well as the amount necessary to make good his debt to the victim.

At his discretion, an offender may own up at once and make restitution to the victim without ever involving the police or courts. In a just society under common law this will usually be the cheapest option. But he may also choose to gamble on not being caught, or on not being convicted. For this to be a fair bet, the penalty must be increased in proportion to the improbability of being caught, or of being convicted; its expectation value will then remain the same, apart from the additional incidental costs. For example, if the police catch 50% of burglars, and if our burglar is caught and pleads guilty, he will have to pay *twice* what his victim is entitled to (plus police costs); if he pleads not guilty, and is subsequently convicted (the court having a 50% conviction rate), he will have to pay twice as much again (plus court costs). Of course, he may get off — on average, though, he will pay just the right amount. Unless he considers the thrill of the chase and the gamble of the courtroom worth the extra cost, he will find it better to settle.

A plaintiff, on the other hand, should be provided with full restitution by the court directly upon filing a complaint, irrespective of whether the offender is subsequently caught or convicted. Think of it as an insurance claim, with the court in the position of the insurer. It is unlikely that the plaintiff would then wish to gamble on the capture or conviction of the offender — but if he did he could easily take out a bet with a bookmaker. Making a *false* claim is of course an offence in itself, for which the claimant could himself be prosecuted.

Justice demands that offenders make full and complete restitution for their offences. But justice *also* demands that offenders be punished *no more than this*. Justice says that every offence creates a debt that must be paid. But justice *also* says that once the debt is paid the offence is washed away. *All* are entitled to justice, the offender just as much as the offended against. Justice is proportional. Justice is measured. Justice is even-handed.

Such simple justice is the corollary of the free market. It allows the violation of rights to be *justified* — that is, made just, or *paid for* — made as if they had occurred by voluntary agreement on the free market.

A key feature of such common law justice is that, for the honest customer or client of the court, it is *cost-free*. It is the criminal or offender who pays. This is as it should be, but we shall see that it creates serious problems for an anarcho-capitalist society.

2. Justice in an Ultraminimal State

An ultraminimal state is one in which the state court claims final disposition of cases concerning its citizens. It does not prohibit other courts from competing, nor forbid the opting out of state protection. Parties may freely choose any court to hear their action, but the state court is the court of last appeal and no citizen can be *forced* to recognise any other. The state court will enforce its judgements against all other courts; but no other court can enforce *its* judgements against the state court. The state court will *not* enforce judgement in favour of persons who have opted out of state protection ("independents"); it *will* enforce judgements *against* independents. (A minimal state, by contrast, claims a complete monopoly.)

A *just* ultraminimal state is one in which the state court enforces common law. It provides full restitution for offences and is therefore *cost-free* for its citizens. It also provides justice for the offender, who pays no more and no less than his due.

The existence (actual or potential) of competing private courts keeps the state court efficient; the existence of the state court keeps the private courts honest.

3. Justice in an Anarcho-Capitalist Society

In an anarcho-capitalist society there is no state, and all the courts are private courts. There is no final court of appeal that all are obliged to recognise, and no uniform code of justice can be enforced. Laws are determined on the market. Everyone may choose which of the competing courts he will look to for protection; and he may alter his choice at will.

In a *just* anarcho-capitalist society the courts enforce the common law; but there is no guarantee that an anarcho-capitalist society *will* be just. It will be just only if the "hidden hand" of the market makes it so. Since a just society is economically efficient, there is reason to hope that the hidden hand *will* lead to justice, even (or especially) in the absence of the state. This is the hope of anarcho-capitalism.

Even if a just anarcho-capitalist society should exist, there is no guarantee that it would be stable. There are many conceivable sources of instability (and many possible ways in which the threat of such instabilities might be averted) but in this essay I am concerned with only one. That one may prove fatal.

The flaw (if it is a flaw) lies in the nature of the courts. Again, there are a number of difficulties that may arise in the operation of the courts under anarcho-capitalism; again, I shall concentrate upon only one. That one is basic.

Will anarcho-capitalist courts be just? Will they provide full restitution and cost-free service — or not? On first analysis it seems that they *will* be just. For suppose the contrary; that some of the courts provide only partial restitution, and require their clients to foot the bill: then such courts will lose business to other courts that *do* provide full restitution and cost-free service. To maintain their market share and stay in business, then, anarcho-capitalist courts will be obliged to honour their customers' demand for full common law justice, no less than under the ultraminimal state. So far, so good.

4. Instability in the Restitution Ratio

For convenience, let us define a "restitution ratio" R as the level of compensation received by a plaintiff relative to the level necessary to make good his total loss of satisfaction. A just court, then, works at a restitution ratio of unity ($R=1$). Our anarcho-capitalist courts (by contrast with the courts of oppressive states) have discovered that they cannot work in the "sub-just" regime of $R<1$. Market forces drive them up to the just regime at $R=1$.

But the story does not end there. The *same* market forces now drive them into the "super-just" regime of $R>1$. Let us consider what will happen next.

One of the competing courts makes a special offer "150% restitution! Cost-free!", attracting clients away from the conservative 100% courts. Who wouldn't rather have 150% restitution than 100%? And why not? After all, it's the criminals who pay. Who cares about *them*? True, there will be some honest souls, with a keen sense of justice, who will refuse to go along with the scam; but for most people (let's face it) greed will win out every time. Besides, this business of proportional restitutional justice is a bit rarefied — will the man in the privately-owned street even bother to understand it? I doubt it — especially since it seems to be in his interest *not* to see the injustice of super-restitution.

Whatever the ethics, customers will flock to the 150% court. And all the other courts will be forced to follow suit, or go out of business. Some *may* go out of business, being too honest for their own good — but most will follow the trend up to $R=3/2$. This starts a "restitution war", courts leapfrogging the competition to win a greater market share. The restitution ratio climbs . . . 150%, 200%, 250% . . . devil take the hindmost and to hell with justice!

It gets worse. For crime is an example of an elastic commodity: reduce the cost and you increase the demand; increase the cost and you reduce the demand. If the restitution ratio is increased, the cost to criminals will increase in proportion; but if the cost of crime goes up, the crime rate will fall even faster. In technical terms, the elasticity of demand is approximately two. Double the cost and crime falls by a factor of four.

So now the courts find themselves competing for an ever-smaller cake — they must take a larger share or go under. The restitution ratio climbs again. Marginal courts go bankrupt, but the ramp continues. More and more courts collapse. The rest start to panic, but they're riding the tiger; they daren't get off. At all costs they must avoid hypertransfer of their remaining business to the competition; so they hyperinflate the restitution ratio instead . . . 1000% . . . 1500% . . . 2000% . . . the crime rate plummets . . . where will it end?

It ends when every court but the strongest has crashed. The sole survivor abruptly freezes its restitution ratio at the peak (say $R=50$) and tries to adjust to its monopoly of a shattered market. It will probably fail. For some time it has been running on its reserves, unable to recoup its costs. It is still losing money, at an increasing rate. Why increasing? Well, the crime rate does not react *instantaneously* to changes in the restitution ratio; it takes time for the effects to work through. So the court's caseload, already at a dismally low level, will continue to fall for some time to come. It might try to save itself by slashing the restitution ratio, but it daren't do so too soon — some of its competitors may not be quite dead yet, and an angry public might boycott it and turn to them. The chances are, the last court goes belly up.

Now what happens? That's clear enough. A massive crime wave. The cost of committing crime nose-dives from an enormous $R=50$ (or whatever) to essentially zero. A society that has been adapting to minuscule levels of crime suddenly finds itself without any formal protection whatsoever. Can the courts start up again? Hardly. Not in time to do much good. And even if they could, the restitution ramp would start up all over again; so what's the point in even trying? The courts stay dead. Crime is rampant. Racketeers flourish. Victims hire thugs and vigilantes for revenge. Feuding spreads. Gang warfare is rife. Violence rules.

A peaceful anarcho-capitalist society has been destroyed, replaced by the chaos of rule by many criminal gangs. Eventually a tyrant will arise to bring order out of chaos, but it is unlikely that liberty will be restored for generations to come.

But possibly the last court does *not* go bankrupt. Perhaps it succeeds in pulling back from the brink and cutting the restitution ratio to something more reasonable. Initially it leaves the penalties imposed on offenders at a relatively high level, redirecting the surplus income to building up its reserves again. Crime remains low. Gradually, the court reduces the restitution ratio offered, and the penalty ratios imposed, while maintaining a healthy gap between them (this is now pure profit). Crime builds up again, slowly, increasing profits further. No other court challenges its monopoly position; however much potential competitors might lust after a piece of the action, they know that the surviving court is now in a position to ruin them (by running the restitution ratio back up again). The court is now dominant, all but unassailable.

The restitution ratio continues to fall. It reaches unity — and *keeps falling*. The penalty ratio keeps falling too — soon it too is below unity. Crime rates — and the court's profits — continue to grow. At length, the court ceases to make restitution at all (in most cases); victims may even have to *pay* to bring a complaint. Punishment for offenders is low (criminals can easily make a net profit), so crime is rampant. Despite low penalties, huge sums are flowing into the court's coffers. No longer adequately protecting its clients, the court has become an actual *accomplice* to the criminal element, enriching itself by their crimes, sharing the proceeds of their robberies.

Does that remind you of anything? Yes. The anarcho-capitalist court has become the state. Quite a subtle state, really, almost admirable! No actual taxation, all the dirty work done by admitted criminals whom the state can plausibly claim to be punishing, no one *forced* to deal with the state at all (only with the criminals — no one *has* to bring a claim). Neat. Still, a state, and an unjust one.

5. Can the Instability be Averted?

The above scenario is credible, but is it inevitable? Or can the instability somehow be averted? No one can know for sure until anarcho-capitalism is actually tried, but it is hard to see how so powerful an instability could be tamed (in the absence of a dominant authority or state).

Perhaps the courts will employ different arrangements, different punishments, different payment schemes, different legal theories and so forth; they need not follow my prescription of the common law. But the notion of average restitution and punishment ratios is quite general. Offering more to the customer and taking more from the criminal is surely possible under *any* market system. The restitution ratio instability does not seem to depend upon organisational detail — it would appear to be fundamental.

I have implicitly assumed that *all* the courts must follow the restitution ramp, or go out of business. Is this true? Not strictly. Consider a non-profit-making court dedicated to the propositions of justice — a church court, perhaps, or a charitable foundation. By its charter it *refuses* to depart from $R=1$, come what may. It will continue to be supported from that (presumably small) fraction of the population that shares its love of disinterested justice; and (while $R>1$ elsewhere) offenders will do handstands to be tried by it. It will continue to do a steady business and will certainly outlast the ramp.

Yet, when the last venal court falls off the perch and the crime wave begins, can the honest court be expected to take up the slack? No doubt it will try. But it is hard to see its succeeding. The force at its disposal will not be great; even if it were able to take over the entire bankrupt organisation of the other courts (and would it even want to?) the previous artificially low crime rate will have left them far short of the resources necessary to cope with the explosion of crime caused by the collapse of the effective punishment ratio. Most likely, it will itself become a victim of the rampaging

criminal gangs (witness the inability of church hospitals to provide sanctuary in the chaos of tribal conflicts in Somalia, Rwanda, Liberia and elsewhere).

Perhaps, by something close to a miracle, the honest court *does* survive the period of chaos. Then almost the entire population will turn to it for justice. Even if other courts subsequently reappear, it is hardly conceivable that they will receive anything like the same degree of support and trust, for their vulnerability to the temptations of the restitution ramp will be plain to all. In time, no doubt, the lessons of the past would be forgotten and the catastrophe repeated. But this need not happen.

For the honest court has become dominant, at a restitution and punishment ratio of unity. It permits honest commercial competition, but protects clients *and* defendants from injustice, being now willing and able to enforce its judgements against any other court. It has become the *de facto* standard, a *de facto* ultraminimal state. Before long we might expect it to be recognised as the *de jure* sovereign, thereby averting the threat of any future ramps.

This is an undeservedly happy outcome, for all but the fanatical anarchist. Yet it is clear that anarcho-capitalism has still succumbed to the restitution ratio instability.

What if the crash is avoided and the surviving venal court starts to run the restitution ratio back down again? The presence of the honest court (if it is not too small) has a beneficial effect in denying monopoly profits to the other. For if its penalty ratio is higher than its restitution ratio, it makes sense for offenders to *pay* plaintiffs to have the case heard in the honest court. Unless the venal court resorts to violence to destroy the other (it probably *will* so resort if it is able), both restitution and penalty ratios will fall together towards unity, without the massive accretion of power and wealth previously described.

The two courts now clash head-on. It is almost certain that one will achieve dominance over the other. If the honest court wins, we have a just ultraminimal state. If the venal court wins, we have an oppressive criminal state. Neither is any longer anarcho-capitalist. In the highly improbable (but not impossible) case of a stalemate, a remnant of anarcho-capitalist society survives; yet the source of the original instability also remains; sooner or later, there will be another cycle, and anarcho-capitalism will fall (and if by some miracle of miracles it survives again, *another* cycle . . .).

6. Conclusions

The functioning of any society is an enormously complex matrix of interactions. It is therefore entirely possible that there is a flaw — or, more likely, an omission — in my logic. For example, in the above I made little use of the fact that there are honest offenders who also suffer from excessive punishment ratios — car drivers, doctors, employers, anyone requiring liability insurance. Thus a restitution ramp will wreck the economy too. Does this create counter-forces strong enough to stop it? I can't see how. But then I cannot see the whole economy.

Nevertheless, the instability of the restitution ratio is not a subtle tuck-it-away-in-a-corner instability. It is a powerful first-order instability in one of the key parameters of society. It is hard to see how any anarcho-capitalist regime can avoid being destroyed by it in a period of a few years or less (fortunately the regime of the just ultraminimal state does not appear to be similarly threatened).

It remains open for any advocate of anarcho-capitalism to describe an efficacious stabilising mechanism, or to invent a variant regime not subject to the same instability. Although I have a personal preference for an ultraminimal monarchy, my ideal world includes anarcho-capitalist territories (and a sprinkling of every other kind of state) as well. So I am inclined to hope (but as of the moment rather to doubt) that a solution will indeed be found, and anarcho-capitalism rescued from this fatal instability!

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